INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	7
Argument:	
I. The deceased partner's distributive share of partnership income earned before his death is subject to income tax	8
A. The Revenue Act exempts no part of partnership income from taxation	10
B. Death of a partner dissolves the partnership and ends an accounting period with respect to the deceased partner	19
C. The deceased partner's share of income received by the partnership before his death was taxable to him	21
II. The decision below did not include decedent's income for a period of more than twelve months	26
III. Congress has not adopted petitioner's interpretation	35
Conclusion	37
Appendix	38

CITATIONS

Cases:

Archbald v. *Commissioner*, 4 B. T. A. 483	23, 24, 25, 35
Bankers Trust Co. v. *Bowers*, 295 Fed. 89	34
Blodgett v. *Silverman*, 277 U. S. 1	8, 20, 27
Bull v. *United States*, 295 U. S. 247	7, 8, 9, 21, 22
Burnet v. *Sanford & Brooks Co.*, 282 U. S. 359	34
Burwell v. *Mandeville's Executor*, 2 How. 559	19
Cahill v. *Haff*, 248 N. Y. 377	19, 20
Choteau v. *Burnet*, 283 U. S. 691	14
Darcy v. *Commissioner*, 66 F. (2d) 581, certiorari denied, 290 U. S. 705	8, 19, 22
Davis v. *United States*, 87 F. (2d) 323, certiorari denied, 301 U. S. 704	28
Davison v. *Commissioner*, 20 B. T. A. 856, affirmed, 54 F. (2d) 1077	22
DeRoy v. *Commissioner*, 19 B. T. A. 452	23, 25, 35
Earle v. *Commissioner*, 38 F. (2d) 965	29
First Trust Co. of Omaha v. *United States*, 1 F. Supp. 900	22

Cases—Continued. Page

Goldman v. *Commissioner*, 15 B. T. A. 1341 ..... 22, 24, 25, 35
Goodby Mills v. *Commissioner*, 3 B. T. A. 1245 29
Haffner v. *Commissioner*, 90 F. (2d) 1009, certiorari denied, October 11, 1937 28
Hall v. *Commissioner*, 25 B. T. A. 1 ..... 22, 24, 35
Heiner v. *Colonial Trust Co.*, 275 U. S. 232 14
Helvering v. *Twin Bell Syndicate*, 293 U. S. 312 37
Helvering v. *Morgan's, Inc.*, 293 U. S. 121 34
Helvering v. *Stockholms Enskilda Bank*, 293 U. S. 84 13
Johnson v. *Commissioner*, 86 F. (2d) 732, certiorari denied, 301 U. S. 683 27
Jones v. *Commissioner*, 12 B. T. A. 471 30
Klingenstein v. *United States*, 18 F. Supp. 1015, certiorari denied, October 11, 1937 28
Loose v. *United States*, 74 F. (2d) 147 36
Maryland Casualty Co. v. *United States*, 251 U. S. 342 36
People's-Pittsburgh Trust Co. v. *United States*, 10 F. Supp. 139 ..... 22, 25, 35
Sartorious v. *Commissioner*, decided April 26, 1937, by Board of Tax Appeals, certiorari denied, 301 U. S. 688 28
Shonnard v. *Price*, 49 F. (2d) 794 29
Smith v. *Commissioner*, 26 B. T. A. 778, petition dismissed, 67 F. (2d) 167 22
Stem v. *Warren*, 227 N. Y. 538 20
Stewart v. *Robinson*, 115 N. Y. 328 19
United States v. *Kaufman*, 267 U. S. 408 27
United States v. *Safety Car Heating Co.*, 297 U. S. 88 13
United States v. *Wood*, 79 F. (2d) 286 22
Wolverine Petroleum Corp. v. *Commissioner*, 75 F (2d) 593, certiorari denied, 295 U. S. 743 15
Wright & Kremers v. *United States*, 3 F. Supp. 616 15

Statutes:

Revenue Act of June 30, 1864, Sec. 117, c. 173, 13 Stat. 223, 282 11
Revenue Act of 1913, Sec. II, D 11
Revenue Act of 1916, Sec. 8 (e), as amended by Sec. 1204 (1), Revenue Act of October 3, 1917 ..... 10, 11
Revenue Act of March 3, 1917, Sec. 201 10
Revenue Act of October 3, 1917, Sec. 201 10
Revenue Act of 1918:
Sec. 200 (a) 17
Sec. 218 (a) 11, 16, 40
Revenue Act of 1921:
Sec. 218 (a) 11
Sec. 226 34
Revenue Act of 1924:
Sec. 200 (a) 17
Sec. 218 (a) 11, 16
Revenue Act of 1926, Sec. 218 (a) 11
Revenue Act of 1928, Sec. 182 (a) 11, 16

Statutes—Continued. Page

Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 12 ... 32
Sec. 41 ... 38
Sec. 42 ... 38
Sec. 48 ... 38
Sec. 181 ... 39
Sec. 182 (a) ... 7, 9, 10, 12, 13, 14, 21, 26, 39
Sec. 182 (b) ... 10, 11
Sec. 183 ... 27
Sec. 189 ... 10
Sec. 1111 (b) ... 14
Revenue Act of 1934, c. 277, 48 Stat. 680:
Sec. 42 ... 36, 39
Sec. 182 ... 11
Revenue Act of 1936, Sec. 182 ... 11
New York Partnership Act, Laws of 1919, c. 408:
Sec. 52 ... 27
Sec. 60 ... 20, 40
Sec. 61 ... 20, 40
Sec. 62 ... 30, 41
Sec. 64 ... 20
Sec. 65 ... 20
Sec. 66 ... 20
Sec. 72 ... 20, 41
Sec. 74 ... 41
Pennsylvania Uniform Partnership Act of March 26, 1915, Penna. Laws, 18, 25–26, part VI, Sec. 43 (Purdon's Penna. Statutes Annotated, Permanent Ed., Title 59, Sec. 105) ... 24

Miscellaneous:
Treasury Regulations 77, promulgated under Revenue Act of 1932:
Art. 901 ... 10, 41
Art. 902 (a) ... 10, 42
Art. 902 (b) ... 10, 18, 42
Art. 941 ... 10
Art. 942 ... 10
Report of the Joint Committee on Internal Revenue Taxation, Volume II (1927) ... 16

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 301

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR, ESTATE OF LAMAR L. FLEMING, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 37) is reported in 34 B. T. A. 384. The opinion of the Circuit Court of Appeals (R. 57) is reported in 89 F. (2d) 692.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 10, 1937 (R. 60). The petition for certiorari was filed on August 10, 1937, and was

granted on October 11, 1937 (R. 61). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the deceased partner's taxable income for the calendar year 1933 includes his share of partnership profits from the beginning of the partnership fiscal period on August 1, 1933, to the date of his death on December 16, 1933.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 38–42.

STATEMENT

The facts as stipulated (R. 11–37) and as found by the Board of Tax Appeals (R. 38–40) are as follows:

Lamar L. Fleming, hereinafter called the decedent or the deceased partner, died on December 16, 1933. Prior to his death his books were kept on the cash receipts and disbursements basis and his income tax returns were made on that basis for the calendar year (R. 11, 38).

Prior to his death the decedent was a member of the partnership of Anderson, Clayton & Fleming, cotton brokers, maintaining its principal office in New York. The firm was formed in 1918 and operated under successive partnership agreements, including the agreement dated August 1, 1930 (R.

18–22) which expired on July 31, 1933. The partnership kept its books and reported its income on the cash receipts and disbursements basis for the fiscal year ending July 31 of each year.

On August 1, 1933, a new partner was admitted to the firm and a new partnership agreement (R. 23–27) was made, which was identical with the previous agreement except for the division of profits and the additional partner. This agreement provided that the partnership fiscal year should begin August 1, 1933, and end July 31, 1934 (R. 24, 38). Each of these two agreements provided in Paragraph Sixth that at the end of each fiscal year for the purpose of ascertaining the profits a general account should be taken and stated of all assets and accounts due to the partnership and of all liabilities, actual or contingent (R. 20, 25). Paragraph Ninth provided that on dissolution assets should be applied first to payment of debts; second, to a return of capital; and, third, to the distribution of profits or surplus (R. 22, 27).

After the termination of the fiscal year ending July 31, 1933, the profits of the partnership for that fiscal year were computed and the partners were notified of their respective shares. A part of the decedent's share of the profits for that fiscal year was left on deposit with the partnership (R. 12, 38).

After the decedent's death the business was continued under the same name by the surviving

partners who early in May 1934, executed a new partnership agreement (R. 27–33), dated as of December 18, 1933 (December 17 being Sunday), and taking over the business as of that date. This agreement provided that the partnership should commence as of December 18, 1933, and should continue until July 31, 1934, and from year to year thereafter (R. 28, 39).

Shortly after the death of the decedent an audit of the accounts of the partnership was made for the period from August 1 to December 16, 1933. On or about January 9, 1934, the decedent's executors received in partial distribution on liquidation of the partnership the sum of $298,730.19,[1] which included the sum of $35,150.88, the decedent's share of the partnership profits received by the partnership between August 1, 1933, and December 16, 1933. This item of $35,150.88, later adjusted to $49,599.72, is the only item of income involved in this case in the Circuit Court of Appeals and in this Court. No part of the profits for this period were paid to the decedent during his lifetime or to his executors during the calendar year of 1933.

On January 30, 1934, the audit was completed and on or about February 5, 1934, the executors were paid an item of interest of $82.50 and the sum

[1] The sum of $298,730.19 also included the decedent's capital investment of $100,000 in the partnership, his credit balance with the firm in the sum of $162,795.67, and interest in the sum of $783.64 (R. 14, 39).

of $150,067.39, which included the sum of $13,-894.74, the decedent's share of uncollected commissions on "open" accounts upon purchases and sales of cotton for future delivery, earned by the partnership on or before December 16, 1933, but not paid until 1934 (R. 13–14, 39). The inclusion of his share of these commissions in the decedent's income was involved in this case before the Board of Tax Appeals, but not before the Circuit Court of Appeals, and is not now involved.

The executors of the estate filed an estate tax return for the decedent which included the decedent's credit balance with the partnership, his capital interest therein, and a share of the profits earned from August 1 to December 16, 1933, and paid an estate tax thereon (R. 16, 40).

On February 28, 1934, an income tax return was filed on behalf of "Anderson, Clayton & Fleming, in Liquidation" for the fiscal year from August 1, 1933 to December 16, 1933. No permission was obtained from the Commissioner of Internal Revenue to file such a return (R. 17, 35–36, 40). On October 28, 1934, an income tax return was filed on behalf of "Anderson, Clayton & Fleming" for the fiscal year from December 17, 1933, to July 31, 1934 (R. 17, 40).

On or about March 15, 1934, the decedent's executors filed his income tax return for the period from January 1 to December 16, 1933, the date of his death, and included his distributive share of the

37510—38——2

profits of the partnership for the fiscal year ending July 31, 1933, but did not include any part of his share of the partnership profits from August 1, 1933, to December 16, 1933.

By letter dated October 25, 1934, the Commissioner notified the petitioner that a deficiency in tax had been determined on the decedent's income for the period from January 1 to December 16, 1933, in the amount of $39,874.31 by adding to the decedent's income for the period from January 1 to December 16, 1933, the item of $63,494.46, which included, in addition to the decedent's share of open commissions in the sum of $13,894.74 and interest in the sum of $5,559.19 on the decendent's capital investment and credit balance with the partnership, the decedent's share of the cash earnings of the partnership during that period in the sum of $49,599.72, determined after eliminating the losses on revaluation on the partnership investments (R. 15, 34–35, 39).

The Board of Tax Appeals excluded from the decedent's income the items of interest and the decedent's share of the open commissions and also the decedent's share of the cash profits of the partnership for the period from August 1, 1933, to December 16, 1933. The petition for review of the Board's decision assigned as error only the last item (R. 52), which was the only item involved in the court below and is the only item now involved in this Court.

The Circuit Court of Appeals reversed the Board and held that the decedent's distributive share of the cash profits of the partnership for the period from August 1 to December 16, 1933, should be included in his income for that period (R. 57–60).

SUMMARY OF ARGUMENT

The deceased partner's distributive share of partnership net income received by the partnership before his death was his income and taxable to him. *Bull* v. *United States,* 295 U. S. 247.

The provision of Section 182 (a) of the Revenue Act of 1932 regulating the taxable year of a partner in which his distributive share of partnership net income is to be taxed, during his life and the continuation of the partnership, does not intend, and should not be construed, to exempt part of a partner's share of partnership income from income taxation on his death. The evident purpose of the section to tax all partnership income, the statutory meaning of the terms "taxable year" and "fiscal year," and the legislative history of Section 182 (a) disclose that the phrase "any taxable year of the partnership" means any accounting period of the partnership.

The death of the partner caused the dissolution of the partnership and the end of an accounting period or "taxable year" of the partnership with respect to the deceased partner's interest in the partnership. New York Partnership Law, Secs.

62, 74. The deceased partner is taxable on his share of the partnership profits disclosed by the accounting as of the date of his death. *Bull* v. *United States, supra; Darcy* v. *Commissioner,* 66 F. (2d) 581 (C. C. A. 2d) certiorari denied, 290 U. S. 705.

Taxation of the decedent's share of the partnership profits does not tax his income for more than a period of one year. A partner's right to a distributive share of partnership net income arises when the accounting period of the partnership ends. *Blodgett* v. *Silverman,* 277 U. S. 1, 10. At that time the partner's share of partnership net income becomes his income. All the partnership income on which the decedent was taxed here became his income in his calendar year of 1933.

ARGUMENT

I

THE DECEASED PARTNER'S DISTRIBUTIVE SHARE OF PARTNERSHIP INCOME EARNED BEFORE HIS DEATH IS SUBJECT TO INCOME TAX

The item of income in question, $49,599.72, is the deceased partner's distributive share of the partnership net income earned and actually received by the partnership between August 1, 1933, and the date of his death on December 16, 1933. In *Bull* v. *United States,* 295 U. S. 247, relied upon by the Court below (R. 59), this Court determined that a deceased partner's distributive share of partnership profits earned before his death and paid to his executors was income earned by him and

taxable to him. This Court stated at pages 254–255:

> We concur in the view of the Court of Claims that the amount received from the partnership as profits earned prior to Bull's death was income earned by him in his lifetime and taxable to him as such; and that it was also corpus of his estate and as such to be included in his gross estate for computation of estate tax. * * *
>
> * * * * * *
>
> The decedent's share of profits accrued to the date of his death was $24,124.20. This was income to him in his lifetime and his executor was bound to return it as such.

The item here involved undoubtedly was net income of the decedent. The petitioner contends, however, that the *Bull* case is not in point because there both the partnership and the deceased partner used a calendar year accounting period but here the partnership was on a fiscal year basis ending July 31 of each year, and the decedent was on a calendar year basis and, therefore, application of Section 182 (a) of the Revenue Act of 1932 results in the exemption of this income from income taxation entirely.

The respondent contends that nothing in the terms or purpose of the provisions of the applicable Revenue Act of 1932, or the applicable court decisions, excludes this income from the income of the decedent subject to an income tax under the *Bull* case.

A. *The Revenue Act Exempts No Part of Partnership Income From Taxation*

Examination of the applicable provisions of the Revenue Act of 1932 discloses no intention that the decedent's distributive share of the partnership income earned and actually received by the partnership before his death shall be exempt from income taxation.

The specific provisions of the Revenue Act of 1932 with respect to partnerships are contained in "Supplement F—Partnerships," Sections 181–189, inclusive. Treasury Regulations 77, Articles 901–941, inclusive, apply. Partnerships as such are not subject to taxation under the Act[2] but are required to make information returns of partnership income stating the amount of the distributive share of each partner. Sections 181 and 189, Articles 901, 941, 942.

Section 182 (a) of the Revenue Act of 1932 provides:

> SEC. 182. TAX OF PARTNERS.
>
> (a) General rule. There shall be included in computing the net income of each partner his distributive share, whether dis-

---

[2] The Revenue Acts of March 3, 1917, Section 201, and of October 3, 1917, Section 201, for a time placed an excess profits tax on partnerships as such in addition to the income tax upon partners only in their individual capacity under the Revenue Act of 1916, Sec. 8 (e), as amended by Section 1204 (1) of the Revenue Act of October 3, 1917. All the other revenue acts impose an income tax upon partners only in their individual capacity.

> tributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.[2]

Section 182 (b), which provides for the method of taxation if a partnership fiscal year begins in one calendar year and ends in another calendar year to which a different law is applicable, is not involved in this case.

The statute and regulations expressly provide for situations in which the partnership and a partner used different accounting periods during the continuation of the partnership. In the present case the partnerships and the deceased partner, while he was alive and during the continuation of the partnerships, used the same method of accounting, cash receipts and disbursements, but different accounting periods. He used a calendar

---

[2] The federal income tax statutes uniformly provide that partners are liable for income tax on their distributive shares of the net income of a partnership, whether distributed or not. Revenue Act of 1936, Sec. 182; Revenue Act of 1934, Sec. 182; Revenue Act of 1928, Sec. 182 (a); Revenue Act of 1926, Sec. 218 (a); Revenue Act of 1924, Sec. 218 (a); Revenue Act of 1921, Sec. 218 (a); Revenue Act of 1918, Sec. 218 (a); Revenue Act of 1916, Sec. 8 (e), amended by Section 1204 (1) of the Revenue Act of October 3, 1917; Revenue Act of 1913, Sec. II, D; Revenue Act of June 30, 1864, Sec. 117, c. 173, 13 Stat. 223, 282.

year and the partnership's used fiscal years ending July 31st of each year.

The fact that the cash receipts method of accounting is used by a partner is expressly controlled by the provision of Section 182 (a) to the effect that each partner's net income shall include his distributive share, whether distributed or not, of the partnership's net income. This provision includes the distributive share of the net income received by the partnership up to the date of the deceased partner's death in his net income in the present case, even though he was on the cash receipts and disbursements basis and never received the income.

Situations in which different periods of accounting are used by a partnership and a partner, during the continuation of the partnership, are controlled expressly by the second sentence of Section 182 (a) which provides that if the accounting periods are different, the amount included in a partner's net income "shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year."

The specific provision in every revenue act which includes in a partner's net income his distributive share of partnership income, whether distributed or not, emphasizes the purpose to tax all partnership income. The specific provision with respect to the taxable year of the partner in which partnership income shall be taxed is concerned with a choice of the tax year of the partner in which the

tax may be levied. In view of the first provision, this second provision in the same section of the law cannot be construed as intending to exempt any part of partnership income from income taxation.

No express statutory provision is made for situations involving the death of a partner and the dissolution of the partnership. In the absence of such a provision the petitioner in effect contends that this second sentence of Section 182 (a), regulating the year in which the income shall be taxed during the life of a partner and the continuation of the partnership, should be construed, upon the death of a partner and dissolution of the partnership, to exempt this income from income taxation entirely by making it taxable only in a taxable year of the decedent which never arises because of his death.

The respondent contends that the fact that this income is not exempt is evident from (1) the purpose to tax all partnership income disclosed by the specific provisions taxing a partner's distributive share of partnership net income, whether distributed or not; (2) the meaning of the phrase "any taxable year of the partnership" in the statute; and (3) the legislative history of Section 182 (a).

1. The revenue acts generally by a broad definition of gross income intend to tax all income not expressly or constitutionally exempt. *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, 93; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 89. Section 182 (a) discloses a similar intent

with respect to all partnership net income, whether distributed or not. Properly construed, in view of its patent purpose to regulate the choice between two taxable years during the life of the partner and the continuation of the partnership, Section 182 (a) did not intend to exempt the income involved here. In the absence of the expression of such an intent such a construction of exemption should be rejected. Cf. *Choteau* v. *Burnet*, 283 U. S. 691, 694; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 234–235.

2. The meaning of the phrase "any taxable year of the partnership" to be derived from the statutory definition of "taxable year" supports the view that the income now involved is not exempt. Section 48 (a), appearing under that part of the Act designated "Part IV—Accounting Periods and Methods of Accounting," defines "taxable year" as the calendar year, or the fiscal year ending during such fiscal year upon the basis of which net income is computed. The same section states that the term "taxable year" includes a period less than a year in the case of a return made for a fractional part of a year according to law or regulations. Section 48 (b) defines the term "fiscal year" as an *accounting period* of twelve months ending on the last day of any month other than December. Section 1111 (b) states that the term "includes" when used in a definition in the Act does not exclude other things within the meaning of the term defined. The courts hold generally that "taxable year" may include a period of less than a year.

Wolverine Petroleum Corp. v. *Commissioner*, 75 F. (2d) 593, certiorari denied, 295 U. S. 743; *Wright & Kremers* v. *United States*, 3 F. Supp. 616 (ct. cl.).

These definitions disclose that the phrase "taxable year" as used in these sections and in Section 182 (a) with respect to partnerships means merely an accounting period which may be a year or less. The phrase "any taxable year of the partnership" may be read and interpreted as "any accounting period of the partnership." Only in this sense of an accounting period has a partnership any "taxable year." In any other sense of the term "taxable year" a partnership has no taxable year because it is not a taxpayer.

The court below, basing its decision on this interpretation of the statute, correctly concluded (R. 59):

> Strictly speaking, a partnership has no taxable year since it is not a taxpayer. It is required to file information returns for so-called taxable years which are either fiscal or calendar and are in fact accounting periods covering twelve months. This does not mean that there can be no accounting period of a partnership for income tax purposes for less than twelve months. The present case serves well as an example of what will shorten such an accounting period or taxable year of a partnership, viz, the dissolution of the partnership caused by the death of a partner after the beginning of the current year and before its end.

3. The legislative history of the second sentence of Section 182 (a)[4] supports the construction that "any taxable year of the partnership" means any accounting period of the partnership. This provision first appeared in Section 218 (a) of the Revenue Act of 1918, set forth in the appendix, which provided that if the partner's and partnership's net income was computed on the basis of different periods there should be included in his net income "his distributive share of the net income of the partnership for any accounting period of the partnership ending within" the partner's fiscal or calendar year.[5]

Section 218 (a) of the Revenue Act of 1924 changed the phrase "any fiscal or calendar year" of the partner to the present phrase, "any taxable year" of the partner without any change of meaning. Similarly, the phrase "any accounting period of the partnership" was changed by the Revenue Act of 1928[6] to the present phrase, "any taxable

---

[4] Section 182 of the Revenue Act of 1928 and the same section of all later revenue acts contain the same sentence.

[5] The House bill contained the phrase "the last annual accounting period of the partnership prior to the close" of the partner's fiscal or calendar year and was changed by a Senate amendment to the phrase "any accounting period of the partnership ending within" the partner's fiscal or calendar year. Cf. H. R. 12363, 65th Congress, 3rd Sess. (Committee Print—As Agreed to in Conference).

[6] The Report of the Joint Committee on Internal Revenue Taxation, Volume II, Proposed Rearrangement of Income Tax Title (1927), proposed a draft of the Revenue Act of 1928 in the rearranged form in which that Act and

year of the partnership," without any change of meaning. These changes were made merely to obtain and to complete the uniform terminology which now appears in the rearranged form of the revenue acts since the Revenue Act of 1928.

Section 200 (a) of the Revenue Act of 1918 contained the definition of "taxable year" as a calendar or fiscal year and the definition of "fiscal year" as an accounting period. Section 200 (a) of the Revenue Act of 1924 added the statement that "taxable year" includes a period of less than a year. This fact that "taxable year" was defined as a calendar or fiscal year and that "fiscal year" was defined as an accounting period under all these revenue acts supports the view that the change of terms, defined in the same manner in these revenue laws, did not change the meaning.

Furthermore, the fact that these changes were made without comment, so far as an examination of their legislative history has revealed, supports the view that no change of meaning occurred.

The petitioner argues in Point II of its brief (pp. 14–16) that, as a matter of statutory construction of Section 182 (a), Congress, by use of the phrase "*any* taxable year of the partnership," meant "*only one* taxable year of the partnership."

---

all later revenue acts have appeared. Section 182 (a) of that draft used the phrase "any accounting period of the partnership" which had been used in former acts, and the House bill (H. R. 1, 70th Congress, 1st Sess.) changed it to the present form of "any taxable year of the partnership."

The respondent submits that neither the common meaning of the word "any" nor its meaning in this context permits such a restricted construction in order to exempt income from income taxation. The original change of the provision in Section 218 (a) of the House bill which became the 1918 Revenue Act from "the last annual accounting period of the partnership" to "any accounting period of the partnership" makes this clear.

The petitioner seeks to aid its construction by reference to the fact that Treasury Regulations 77, Art. 902 (b), instead of repeating verbatim the statutory phrase "any taxable year" paraphrases it as "the taxable year." This phrase in Article 902 (b) indicates no intention to go beyond mere repetition of the statute and means any taxable year, or all of the taxable years of the partnership, within the meaning of the language of the statute.

The respondent submits that the purpose, meaning, and history of Section 182 (a) make it clear that the statutory phrase "any taxable year of the partnership" means any accounting period of the partnership. The court below correctly reached this result and then correctly applied the uniformly accepted statutory and common law rule of partnership law, discussed below, to the effect that the death of a partner dissolves a partnership and ends an accounting period with respect to the deceased partner.

B. *Death of a Partner Dissolves the Partnership and Ends an Accounting Period with Respect to the Deceased Partner*

The partnership here involved, maintaining its principal office in New York (R. 11), was a New York partnership governed by the New York Partnership Law (New York Laws 1919, ch. 408, as amended, Consolidated Laws, ch. 39, succeeding Consolidated Laws of 1909, ch. 44) which adopted the Uniform Partnership Act. "Dissolution and Winding Up" of partnerships is regulated by Article 6, Sections 60 to 75.

The death of a partner causes dissolution of a partnership under the New York Partnership Law (Sec. 62, subdivision 4; *Cahill* v. *Haff*, 248 N. Y. 377, 380; *Darcy* v. *Commissioner*, 66 F. (2d) 581, 584 (C. C. A. 2d), certiorari denied, 290 U. S. 705) and at common law. *Burwell* v. *Mandeville's Executor*, 2 How. 559, 576; *Stewart* v. *Robinson*, 115 N. Y. 328, 333. The partnership agreement in the instant case contained no specific provision for winding up or carrying on the business on the death of a partner. The partnership was dissolved by operation of law.

The dissolution of a partnership by the death of a partner terminates all authority of any partner to act for the partnership, except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not finished, or to

bind the partnership or other partners except in limited circumstances provided by statute. Secs. 64–66; cf. Secs. 60, 61, 72.

A most important legal effect of dissolution of the partnership is that the right to an account of the deceased partner's interest accrued to his executors at the date of dissolution in the absence of a contrary agreement. Sec. 74.

The partnership agreement in this case provided only that at the end of each fiscal year, for the purpose of ascertaining profits, a general account should be taken and stated (R. 25) and that on dissolution for any cause the assets should be applied, in turn, to pay debts, to return invested capital, and to distribute profits (R. 27). The agreement did not modify the right of the petitioner to an accounting which accrued upon the death of the partner.

The right of the deceased partner before his death to possess specific partnership property for partnership purposes vested in the surviving partners and not in his personal representative. Sec. 51; *Blodgett* v. *Silberman,* 277 U. S. 1, 10. The legal representative received the right to an accounting under Section 74. *Cahill* v. *Haff, supra; Stem* v. *Warren,* 227 N. Y. 538, 546.

The surviving partners recognized that the partner's death ended a partnership accounting period with respect to his share and made an ac-

counting of his share as of the date of his death (R. 39).

These applicable provisions of the partnership law make it clear that the most important effect of dissolution of a partnership, so far as the interest of the deceased partner is concerned, is the ending of an accounting period of the partnership. The respondent submits that the ending of such an accounting period in the present case upon the death of the partner was the ending of an accounting period or "taxable year" of the partnership within the meaning of Section 182 (a) of the Revenue Act of 1932.

C. *The Deceased Partner's Share of Income Received by the Partnership Before His Death Was Taxable to Him*

In addition to the interpretation of Section 182 (a) of the Revenue Act of 1932 and the ending of a partnership accounting period by the death of a partner by operation of partnership law, in the absence of an agreement to the contrary, discussed above, the respondent's position is supported by the cases taxing a deceased partner's share of partnership income earned up to the time of his death.

If a partner dies during a partnership annual accounting period ending within his taxable year he is required to pay an income tax on his share of partnership profits earned before his death. *Bull*

v. *United States,* 295 U. S. 247; *Davison* v. *Commissioner,* 20 B. T. A. 856, affirmed without opinion, 54 F. (2d) 1077 (C. C. A. 2d); *Smith* v. *Commissioner,* 26 B. T. A. 778, petition to review dismissed because not filed in time, with a statement that the decision below was correct, 67 F. (2d) 167, 170 (C. C. A. 4th); *People's-Pittsburgh Trust Co.* v. *United States,* 10 F. Supp. 139 (Ct. Cls.); *First Trust Co. of Omaha* v. *United States,* 1 F. Supp. 900 (Ct. Cls.); *Hall* v. *Commissioner,* 25 B. T. A. 1; *Goldman* v. *Commissioner,* 15 B. T. A. 1341.

In *Bull* v. *United States, supra,* this Court held at page 254 that profits earned by the partnership before the death of the partner "was income earned by him in his lifetime and taxable to him as such; * * *."

If the deceased partner's share of partnership profits is determined not at his death but, pursuant to the partnership agreement, at the end of an annual accounting period after his death, the Commissioner's determination of his share at his death by proration, will be upheld in the absence of evidence that the proration does not disclose his actual distributive share at the date of his death. *Darcy* v. *Commissioner,* 66 F. (2d) 581 (C. C. A. 2d), certiorari denied, 290 U. S. 705. Compare *United States* v. *Wood,* 79 F. (2d) 286 (C. C. A. 3d), certiorari denied, 296 U. S. 643.

In the *Goldman* case the Board approved taxing a deceased partner, on the calendar year and cash

basis, who died on November 10, 1924, on his distributive share of net income earned by the partnership, on the same basis, up to that time.

These cases show that it was not intended by the statute to exempt from the income tax any part of the deceased partner's distributive share of partnership income earned before his death. The petitioner, however, relies on *R. W. Archbald, Jr., et al* v. *Commissioner,* 4 B. T. A. 483 and *DeRoy* v. *Commissioner,* 19 B. T. A. 452, as expressing a rule in its favor on facts similar to the facts here.

In the *Archbald* case, the Board, two members dissenting without opinion, held that only the deceased partner's share of partnership income earned in its fiscal year ending January 31, 1920, could be included in his calendar year return for 1920, when he died on August 15, 1920. In the *DeRoy* case the Board followed the *Archbald* decision without extended discussion.[1]

In the *Archbald* case the Board cited no authority for its conclusion. It admitted at page 484 that the partner's "death in 1920 ended his accounting or taxable period" and dissolved the partnership. It refused to hold, however, that the death of the partnership, its dissolution, ended its

---

[1] Under these decisions if a partnership were formed on January 31, 1933 (or any time during 1933, after January 1, 1933), and used a fiscal year ending in 1934, the share of partnership income of a partner using the calendar year basis and dying during 1933 would not be subject to income tax to him or to his estate.

accounting or taxable period. It made no reference to the statutory provision of the Uniform Partnership Act, applicable to this Pennsylvania partnership, to the effect that death of a partner gives his representative a right to an accounting as of the date of death and dissolution of the partnership (Pennsylvania Uniform Partnership Act of March 26, 1915, Penna. Laws, 18, 25–26, part VI, Sec. 43, Purdon's Penna. Statutes Annotated, Permanent Ed., Title 59, Sec. 105) and thereby ends an accounting period of the partnership."

In *Goldman* v. *Commissioner,* 15 B. T. A. 1341, the majority opinion states at page 1352:

> To the extent, however, that the views expressed in the *Archbald* case are in conflict with the views herein expressed, the *Archbald* case is overruled.

The dissenting opinion stated at page 1354:

> It is also pertinent to point out that the prevailing opinion overrules *R. W. Archbald, Jr., et al.,* 4 B. T. A. 483.

In *Hall* v. *Commissioner,* 25 B. T. A. 1, the Board stated at pages 3–4:

> In the *Goldman* case we specifically overruled the *Archbald* case in so far as the two were in conflict. This leaves the *Goldman* case as representing our present view.

It is apparent that the Board does not consider its reasoning consistent in the *Archbald, Goldman,* and *DeRoy* cases. The Board states that death ends the partner's accounting period or taxable

year. *R. W. Archbald, Jr. et al.*, 4 B. T. A. 483, 484. The same rule is stated elsewhere with respect to taxation of deceased partners. *People's-Pittsburgh Trust Co.* v. *United States*, 10 F. Supp. 139, 142. The Board errs in holding that dissolution of the partnership does not also end its accounting period with respect to the deceased partner.

The surviving partners recognized that the partner's death ended an accounting period or "taxable year" of the partnership not only by making an accounting as of the date of his death; but also by filing an income tax return on February 28, 1934, without obtaining permission of the Commissioner of Internal Revenue, for the partnership in liquidation which was designated "Partnership Return of Income. For Fiscal Year 1933. Fiscal Year Begun August 1, 1933, and ended 12/16/33" (R. 17). This indicates that the respondent's interpretation of Section 182 (a) conformed to the business practice of the partnership which treated the death of a partner as closing an accounting period or taxable fiscal year of the partnership.

It is submitted that the Congress intended to tax all of a deceased partner's share of partnership income earned before his death. A rule of partnership law, in the absence of a contrary agreement, gives to a deceased partner's representative the right to an account at the date of dissolution of the partnership and thereby ends an accounting

period of the partnership in respect of the deceased partner's share of partnership profits. The cases cited herein holding that a deceased partner is taxable on his distributive share of partnership net income earned at his death before the end of the partnership's annual accounting period indicate that his death ends a partnership accounting period or "taxable year" with respect to the decedent's share. In view of these considerations the court below correctly held that an accounting period or "taxable year" of the partnership within Section 182 (a) of the Revenue Act of 1932 ended at the death of the partner and the dissolution of the partnership.

II

THE DECISION BELOW DID NOT INCLUDE DECEDENT'S INCOME FOR A PERIOD OF MORE THAN TWELVE MONTHS

The petitioner states in Point I of its brief (p. 12) that the clear effect of the decision below is the inclusion of income of 16½ months of the decedent.

The court below correctly answered the petitioner's contention that 16½ months of the decedent's income was included when it stated (R. 59):

> Of course this made two "partnership taxable years" end in one taxable year of the decedent. Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer. * * *

Sections 182 and 183 of the Revenue Act of 1932 provide for the computation of partnership net income separately from a computation of a partner's net income and thus recognizes the separate entity of a partnership for this purpose. For other purposes, other statutes also recognize "the separate entity of the partnership." *United States* v. *Kaufman*, 267 U. S. 408, 411. The partners do not own partnership assets as such. The interest of a partner is the right to receive a share of the net value of assets over liabilities after a settlement or account. *Blodgett* v. *Silberman*, 277 U. S. 1, 12. His interest is his share of the profits and surplus. New York Partnership Law, Sec. 52.

This recognition of the partnership entity for tax purposes has been applied also in the cases holding that a partner may not offset personal losses from sales of securtities held for two years or less against his distributive share of partnership profits from similar sales even though he may offset such losses against gains from his own similar sales. *Johnson* v. *Commissioner*, 86 F. (2d) 732 (C. C. A. 2d), certiorari denied, 301 U. S. 683; *Sartorious* v. *Commissioner*, decided April 26, 1937, by the Board of Tax Appeals but unreported, petition for review pending undetermined in the Circuit Court of Appeals for the Second Circuit when a petition for certiorari was filed, and denied, 301 U. S. 688; *Haffner* v. *Commissioner*, 90 F. (2d) 1009 (C. C. A. 2d), certiorari denied October 11, 1937; *Klingenstein* v. *United States*, 18

F. Supp. 1015 (C. Cls.), certiorari denied October 11, 1937; cf. *Davis* v. *United States*, 87 F. (2d) 323 (C. C. A. 2d), certiorari denied, 301 U. S. 704.

The statutory scheme of including in a partner's net income the partnership income earned before the beginning of a partner's accounting period, if the partnership accounting period ends in his accounting period, indicates that the period in which partnership income is earned by the partnership does not determine the time at which the decedent earned or obtained a right to his taxable distributive share of partnership net income. The decedent's distributive share arose and became taxable to him at the end of each accounting period of the partnership with respect to him. At that time his right to an accounting and determination of his distributive share arose. As of that time partnership net income was computed, his distributive share was determined, and his income arose.

This view that the income of the decedent for more than one year has not been included because the decedent's distributive share of partnership net income did not arise as the partnership earned income but only when partnership net income was determined at the end of the two accounting periods of the partnership ending within the decedent's taxable year is supported by several other considerations.

1. The decedent's share of partnership net income would not be determined before the end of a partnership accounting period. Income in the

first part of the accounting period before the decedent's taxable year, might be offset by losses in the latter part of the accounting period. *Earle* v. *Commissioner*, 38 F. (2d) 965 (C. C. A. 1st). The decedent's share of partnership net income did not arise until the end of an accounting period fixed the date for determination of his share. The ending of two accounting periods in his calendar year of 1933 determined his income from the partnership in that year.

2. Even if partnership income is distributed monthly to a partner, it is not income in the taxable year received if the partnership accounting period ends in the partner's next taxable year. It becomes his taxable income in his taxable year in which the partnership accounting occurs. *Shonnard* v. *Price*, 49 F. (2d) 794 (E. D. N. Y.); *J. H. Goodby Mills* v. *Commissioner*, 3 B. T. A. 1245. The statutory test is not how many months' partnership income may be taxed but whether a partnership accounting period, or more than one such period, ends in the partner's taxable year and thus determines his share of partnership net income taxable to him in that year. Cf. *Jones* v. *Commissioner*, 12 B. T. A 471.

3. Furthermore, the two partnership accounting periods or "taxable years" involved are accounting periods of two different partnerships of which the decedent was a member. The accounting period ending July 31, 1933, was the accounting period of

the partnership formed by the partnership agreement dated August 1, 1930 (R. 18–22) which provided in Article Third (R. 19) that the partnership should continue until July 31, 1931, and thereafter should be deemed to have been continued from year to year unless any one of the partners should give notice of intention to terminate the partnership on July 31st of any year, provided that the partners could dissolve the partnership by mutual consent at any time.

The second accounting period ending on December 16, 1933, was the accounting period of the partnership formed on August 1, 1933, and dissolved on December 16, 1933, by the partner's death. This partnership agreement (R. 23–27) admitted a new partner and provided for a different division of partnership profits.

Dissolution of a partnership is caused by the termination of the definite term provided in the agreement. New York Partnership Law, Sec. 62, subdivision 1 (a). When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of a deceased partner assigns) his rights in partnership property to two or more partners, or to one or more partners and one or more third persons, if the business is continued without liquidation of partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business. Sec. 72.

The new partnership agreement, admitting a new partner and continuing the business, produced the dissolution of the first partnership and the formation of the second partnership on August 1, 1933. Inclusion of decedent's share of partnership net income for one year from one partnership and for four months from another partnership does not include his income for more than a year but only includes income accrued to him from two partnerships in one year.

4. The revenue acts now recognize that even non-partnership income must be treated differently in the taxable year of a taxpayer's death than if he had lived through all of that year. Section 42 of the Revenue Act of 1932 provides that amounts accrued up to the date of death of a taxpayer shall be included in computing net income if not otherwise includible. As a result of this section a taxpayer on a cash basis is taxed during the year of his death on income on which he would not be taxed until the following year if he had lived. It is his income, however, during the year in which he died.

Before the enactment of the Revenue Act of 1932 the same result was accomplished with respect to partnership income by the method in which it was taxed. Sec. 182 (a) taxed a partner on his distributive share of partnership income whether distributed or not, even though he was on a cash basis for other income. When death dissolved the

partnership and ended its accounting period, the decedent's distributive share was determined as of that date and taxable to him in that year even though, if he had lived, it would not have been determined or taxable until the next year because the accounting period of the partnership would not end until the next year.

The petitioner states (brief p. 12) that by including the decedent's share of the partnership profits for the period ending with his death, as well as for the period ending July 31, 1933, his surtax rate is raised from 29% (applicable as the return was filed) to 50% under the Commissioner's determination. It is not understood how the petitioner computed these surtax rates of 29% and 50%. It is true that under Section 12 of the Revenue Act of 1932 the surtax rate is 50% on the excess income over $200,000, the sum of $31,919.45 in this case, as the income is determined on the decision of the court below. But on the excess income over $150,000, the sum of $32,319.73, as reported in the decedent's return, the surtax rate is 49% and not 29% and, therefore, apparently the petitioner does not refer to the surtax rates or surtax brackets in this sense.

The return as filed reported a net income of $182,319.73. The surtax on $150,000 was $46,460.00 and on the remaining sum of $32,319.73 the surtax at 49% was $19,836.67, a total surtax of $62,296.67. This surtax is 34% of the net income of $182,319.73.

The decedent's share of partnership profits from July 31, 1933, to December 16, 1937, added to his income under the decision of the court below was $49,599.72, the item of income here involved. This sum added to the income reported makes an income of $231,919.45. The surtax on $200,000 is $70,960.00, and on the remaining sum of $31,919.45 at 50% is the sum of $15,959.72, a total surtax of $86,919.72. This surtax is 37% of the net income of $231,919.45. It would appear that inclusion of the item now involved changes the surtax rate in this sense from 34% to 37% and not from 29% to 50%.

If the additional item of income of $49,599.72 were taxed under the lower bracket at the rate of 49%, in the amount of $24,303.86, and this sum were added to the surtax of $62,296.67 reported for the decedent, a total surtax of $86,600.53 would be obtained under the lower bracket. This sum is only $319.19 less than the total surtax of $86,919.72 under the higher bracket. The argument based on the change of rate of surtax does not support a claimed exemption of this item entirely from income tax. Such an exemption would cause a difference of income tax liability of $28,620.04, the difference between the tax liability reported in the amount of $76,380.06 and the amount of $105,000.10 computed on the basis of the decision of the court below.

Helvering v. *Morgan's, Inc.*, 293 U. S. 121, cited by petitioner, involved a question totally unrelated

to the question here. There, a corporation joined an affiliated group and was required to file two returns in 1925. The question was whether the two separate periods in 1925 constituted two "taxable years" within the meaning of Section 206 of the Revenue Act of 1926, which permits a taxpayer suffering a net loss in any taxable year to deduct it from taxable gains in the two succeeding taxable years.

Burnet v. *Sanford & Brooks Co.*, 282 U. S. 359, also cited by petitioner, involved the attempt of a taxpayer to deduct losses in a prior year from receipts in a subsequent year from the same transaction.

Bankers' Trust Co. v. *Bowers*, 295 Fed. 89 (C. C. A. 2d), decided by the court below and cited by the petitioner, involved Section 226 of the Revenue Act of 1921, which provided that where, with the approval of the Commissioner, a taxpayer changed his basis of computing net income from fiscal year to calendar year or calendar year to fiscal year, separate returns must be filed placing the income on an annual basis by a special statutory computation. The statement in the opinion, for purposes of construing Section 226, that the decedent's tax period did not end with his death has no application to this case of a deceased partner's taxable year which does end with his death. *People's-Pittsburgh Trust Co.* v. *United States*, 10 F. Supp. 139, 142.

III

CONGRESS HAS NOT ADOPTED PETITIONER'S INTERPRETATION

The petitioner argues in Point IV of its brief (p. 24) that reënactment of Section 182 (a) after the decisions of the Board of Tax Appeals, acquiesced in by the Commissioner, constitutes implied legislative approval of those decisions. That rule in aid of construction of a statute may operate in the case of an authoritative decision of this Court, or a substantial number of decisions of lower courts, acquiesced in by the Commissioner, and of a character important enough for indulgence of the presumption that Congress was aware of them. But the operation of that rule here is not warranted by the decisions of the Board on which the petitioner relies (*Archbald* and *DeRoy* cases) and which disclose, when read with other Board decisions (*Goldman* and *Hall* cases) that even the members of the Board are not in agreement on the reasoning on meaning of their decisions. An examination of all of the decisions of the Board cited herein does not disclose a clear, well known, and accepted rule which it may be presumed was known to Congress, approved by Congress, or embodied in the reënacted provision of the statute.

The petitioner also argues (brief pp. 7–10) that some income was exempted on the death of a taxpayer on the cash receipts and disbursements basis before Section 42 of the Revenue Act of 1934 provided that in the case of the death of a taxpayer

income accrued up to the date of death should be included, *if not otherwise properly includible.* The petitioner argues that this section changed the law and that, therefore, the decedent's partnership income before the change was exempt. It will be noted, however, that even before the change, income not actually received by a taxpayer on a cash basis might be taxed as constructively received in some situations. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *Loose* v. *United States,* 74 F. (2d) 147 (C. C. A. 8th).

Furthermore, the quotation from the sub-committee report on page 9 of the petitioner's brief makes it clear that the amendment was concerned with income generally of a taxpayer on a cash basis and was not in any manner concerned with computation of a partner's share of partnership net income which is computed under Section 182 (a), which was not changed in the Revenue Act of 1934. It becomes apparent that the amendment did not affect partnership income when it is noted that Section 182 (a) includes in a partner's net income his distributive share of partnership net income, whether distributed or not, and whether he is on a cash or accrual basis. Even if the amendment be held now to apply to a partner's share of partnership net income it accomplishes only what Section 182 (a) accomplishes without the amendment and, therefore, is merely an additional statement of existing law with respect to partnership

income. *Helvering* v. *Twin Bell Syndicate* 293 U. S. 312, 322.

CONCLUSION

Congress intended to tax all income not specifically exempted. Section 182 (a) should not be construed to defeat that intention. The decision of the court below should be affirmed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
Special Assistant to the Attorney General.
EDWARD J. ENNIS,
Attorney.

JANUARY 1938.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169, 185, 187, 222:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

SEC. 48. DEFINITIONS.

When used in this title—

(a) *Taxable year.*—"Taxable year" means the calendar year, or the fiscal year

ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.

(b) *Fiscal year.*—"Fiscal year" means an accounting period of twelve months ending on the last day of any month other than December.

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

SEC. 182. TAX OF PARTNERS.

(a) *General rule.*—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.

Revenue Act of 1934, c. 277, 48 Stat. 680, 694:

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as

of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period (U. S. C., Title 26, Sec. 42).

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

New York Partnership Act, Laws of 1919, c. 408:

SEC. 60. *Dissolution defined.*—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

SEC. 61. *Partnership not terminated by dissolution.*—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

SEC. 62. *Causes of dissolution.*—Dissolution is caused:

* * * * *

4. By the death of any partner;

* * * * *

SEC. 72. *Liability of persons continuing the business in certain cases.* 1. When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

* * * * *

SEC. 74. *Accrual of actions.* The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of agreement to the contrary.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 901. *Partnerships.*—Partnerships as such are not subject to taxation under the Act, but are required to make returns of income. (See section 189 and articles 941 and 942.) Individuals carrying on business in partnership are, however, taxable upon their distributive shares of the net income of such partnership, whether dis-

tributed or not, and are required to include such distributive shares in their returns. The net income of the partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that the deduction of contributions or gifts is not permitted, * * *.

ART. 902. *Distributive shares of partners.*—The distributive share of the net income of the partnership which a partner is required to include in his return is his proportionate share of the net income of the partnership, either—

(*a*) For the taxable year upon the basis of which the partner's net income is computed, or

(*b*) If the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for the taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

U.S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 301.—October Term, 1937.

Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Deceased, Petitioner, *vs.* Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 28, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

Whether a deceased partner's taxable income for the calendar year 1933 includes his share of partnership profits from the beginning of the partnership fiscal year on August 1, 1933, to the date of his death in the same year, in addition to his share of the partnership profits for its fiscal year ending July 31, is the question for decision.

Petitioner's testator, who died December 16, 1933, was a member of a New York partnership whose fiscal year expired on July 31, 1933. The partnership, with the addition of a new partner, was renewed, by agreement, for one year from August 1. After his death the surviving partners, by a further agreement, continued the partnership business from that date until July 31 of the next year, as of which date profits were to be determined, and thereafter from year to year. Decedent kept his books on the cash receipts and disbursements basis and filed his returns for income tax for each calendar year on that basis. The partnership kept its books on a like basis, but made its returns for a fiscal year ending July 31.

Upon a partnership accounting as of the date of decedent's death, his share of the profits from August 1 to that date was ascertained and in the following January and February was paid to petitioner, as executor. In making return for taxation of decedent's income for 1933, petitioner included decedent's share of the firm profits accruing for the year ending July 31, but omitted to return his share of the firm profits earned between that time and his death.

The Commissioner's determination of a deficiency based on the omitted income, was set aside by the Board of Tax Appeals. 34 B. T. A. 384. The Board's order was reversed by the Court of Ap-

peals for the Second Circuit, which held that decedent's share of the partnership profits for the year ending July 31 and for the ensuing period ending December 16, 1933, was income of decedent in 1933 and taxable as such for that year. 89 F. (2d) 692. We granted certiorari, — U. S. —, the question being of importance in the administration of the revenue laws and the decision being challenged by petitioner as not in harmony with *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359.

Both by the practical construction given to the partnership agreement by petitioner and the surviving partners, and by the applicable provisions of the New York Partnership Act,[1] decedent's death dissolved the partnership, terminated his right to share in the profits, and fixed the date as of which the surviving partners were bound to account for the profits. *Darcy* v. *Commissioner*, 66 F. (2d) 581. Decedent's estate in fact received the profits accrued on the date of his death, and partnership profits thus accrued and distributable by reason of the death of a partner are his income, taxable as such. *Bull* v. *United States*, 295 U. S. 247. But petitioner insists that here they cannot be included in decedent's 1933 income for purposes of taxation, since in that case his partnership profits both for the full year ending July 31, 1933 and for the ensuing four and one-half months' period ending with his death in December, would be taxed as his profits for a single year. This it is said offends against the policy of the revenue acts to assess income taxes annually on the basis of twelve month periods and, so offending, conflicts with the appropriate construction of the applicable provisions of §§ 181, 182 of the Revenue Act of 1932, 47 Stat. 169, relating to the taxation of partnership profits.

---

[1] New York Partnership Act, Laws of 1919, c. 408:

"Sec. 60. *Dissolution defined.*—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

"Sec. 61. *Partnership not terminated by dissolution.*—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

"Sec. 62. *Causes of dissolution.*—Dissolution is caused:

. . . . . .

"4. By the death of any partner;

. . . . . .

"Sec. 74. *Accrual of actions.*—The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of agreement to the contrary."

Under the Act of 1932, as with earlier revenue acts, partnerships are not taxed upon their income. By § 189 they are required to file information returns showing the partnership profits and the respective shares of the partners in the profits. But § 181 provides that the partners shall be "liable for income tax only in their individual capacity", and § 182(a) reads:

"*General rule.*—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year."

Since the partnership is not a taxpayer, it has no taxable year in a literal sense. But as used in this section "taxable year of the partnership" means its fiscal year, for "taxable year" is defined by § 48 as including in its meaning "a fiscal year . . . upon the basis of which the net income is computed" and "fiscal year" is defined as "an accounting period of twelve months ending on the last day of any month other than December." A "taxable year", it is declared, includes the period for which a return is made when, under the provisions of the act or regulations, a return for a fractional part of a year is required. As a partner's profits are ascertainable only on an accounting for such periods as may be fixed by law or by the partnership itself, and as the fiscal year or accounting period of the partnership may differ from that of the taxable year of the partner, §182(a), as a matter of convenience to taxpayers, authorizes and provides for this difference by requiring in that case that the partner's distributive share of the profits ascertained at the end of the partnership fiscal year shall be included in his taxable income for the year in which the fiscal year of the partnership ends.

Petitioner does not complain of the taxation of decedent's share of the partnership profits for the year ending July 31 as 1933 income. But it contends that the reference in § 182(a) to the "taxable year of the partnership", and the requirement that the amount of the partner's taxable income "shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year", read in their context and in the light of the practice long established by the revenue acts, of taxing income for twelve month periods, contemplate that a partner returning

income for a calendar year shall be taxable in that year only upon his income from his firm for a single partnership year. This is said to be the case even though the income derived by a partner from the firm business between the end of the partnership fiscal year and the date of his death in the same year cannot be taxed in any other.

This argument is, we think, based upon a misconception of the policy of the Act and a mistaken construction of § 182(a). It is true that the acts of Congress taxing income have consistently laid the tax upon the net income received by or accrued to the taxpayer in a "taxable year", which is either the calendar year or a different fiscal year, as the taxpayer may elect. But they have never undertaken to limit the income taxable in any one year to that derived from the taxpayer's activities occurring in that or any other single year. The items of gross income and of allowed deductions to be included in the income return, are those of the taxpayer for his taxable year, even though they may have resulted from or be affected by his business transactions of other years. *Burnet* v. *Sanford & Brooks Co., supra,* 364, 365. Circumstances wholly fortuitous may determine the year in which income, whenever earned, is taxable, and may thus affect the amount of tax. Receipt of income or accrual of the right to receive it within the tax year is the test of taxability, not the time it has taken the taxpayer to earn it nor the duration of his investments which have finally resuled in profit. *Lucas* v. *Alexander,* 279 U. S. 573.

The revenue acts have consistently adhered to that policy in taxing the income of a partner. Since the partner is entitled to profits only upon a partnership accounting at the end of an accounting period, his profits become subject to income tax when and as they are thus ascertained. As in the case of all other taxpayers, the partner's net income is required by the general provisions of § 41 to be computed "on the basis of the taxpayer's annual accounting period", here the calendar year, so as clearly to reflect the income. And §182(a) commands that the distributive share of each partner in the partnership profits shall be included in computing his tax, whether distributed or not.

By these provisions the taxable income of a partner is limited to that share of the partnership earnings to which he becomes entitled within his taxable year, but it includes all the distributive share of the partnership income which accrues to him in that year even though earned in an accounting period not wholly

within the year, and though his return, as in the case of decedent, is on the cash receipts and disbursements basis. If the provisions stood alone it would seem plain that the profits accruing to decedent from the two partnership accountings within his taxable year would be taxable in that year, even though the accounting periods aggregated more than twelve months. We think the concluding sentence of § 182(a), which provides for the case where the partner's taxable year differs from that of the partnership, does not call for any different result.

We need not inquire too meticulously whether the partnership "taxable year", within the meaning of §182(a), includes in the special circumstances of this case an accounting period of less than twelve months, here from July 31 to the death of decedent. Petitioner makes no contention that it does not, nor could well do so, for if not so included it is not within the phrase "any taxable year of the partnership", occurring in the second sentence of § 182(a), on which petitioner relies to exclude the income for that period from taxation otherwise imposed by the general provisions of § 41 and the first sentence of § 182(a). The argument is that the year ending July 31, 1933, was one partnership fiscal year or accounting period, and that the ensuing period until the death of decedent was another, and that the inclusion of the income for both periods in decedent's taxable income is precluded by the use of the phrase "any taxable year" in § 182(a), which it is said must be taken to mean any one accounting period of the partnership.

But we think the sentence must be read as supplementing the preceding one and § 41, and not as limiting them. We can discern elsewhere in the Act no indication of any Cong essional purpose to relieve business income from taxation in the year when, under the applicable provisions of the statute, it is distributable to a partner. Sections 11 and 12 declare in all inclusive terms that income taxes "shall be levied, collected, and paid for each taxable year upon the income of every individual." It would require more precise words than those of § 182(a) directing that the taxable income of a partner shall be based on partnership income for "any" accounting period of the partnership ending within its taxable year, to restrict the broad sweep of §§ 11, 12 and 41. Cf. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 234, 235; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 89; *United States* v.

Safety Car Heating & Lighting Co., 297 U. S. 88, 93; *Helvering* v. *Gowran*, 302 U. S. 238, 243, 244.

The purpose of § 182(a) when read, as it must be, with these other sections, is obviously not to relieve a partner from taxation of any part of the distributive share of the partnership income during the year in which it is distributable. The object is rather to make certain that "the amount so included" in a partner's taxable income "shall be based upon the income of the partnership" distributable during the partner's taxable year, even though an accounting period of the partnership ending in that year may not be wholly within it.

This conclusion is supported by the legislative history of the second sentence of § 182(a). The provision first appeared in § 218(a) of the Revenue Act of 1918. As originally introduced, that section of the House bill which became the Revenue Act of 1918 provided for the taxation of the partner's distributive share of the net income of the partnership for "the last annual accounting period of the partnership", ending within his taxable year. By amendment the quoted phrase was stricken from the bill and the words "any accounting period of the partnership" substituted. See H. R. 12863, 65th Cong., 3rd Sess. (Committee Print — As Agreed to in Conference). The amendment was obviously inconsistent with any purpose to limit the amount of the taxable income to that of any single or particular accounting period of the partnership ending within the partner's taxable year. The phrase was changed by § 182(a) of the Revenue Act of 1928 to its present form, "any taxable year of the partnership". The continued use of the word "any" as qualifying the phrase "taxable year" in the 1928 and 1932 Acts, does not preclude the present tax if "taxable year" be taken to mean a partnership accounting period of less than twelve months. Reasons have already been given why, if it means an accounting period of a full year, the present tax is nevertheless due under § 41 and the first sentence of § 182(a).

Affirmed.

Mr. Justice McReynolds and Mr. Justice Roberts are of opinion that the judgment should be reversed.

Mr. Justice Cardozo and Mr. Justice Reed took no part in the consideration or decision of this case.